

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID LEE BEAN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 3:16-cv-05104 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States Magistrate Judge, Dkt. 8). This matter has been fully briefed (*see* Dkt. 15, 19, 20).

After considering and reviewing the record, the Court concludes the ALJ erred when he failed to provide clear and convincing reasons supported by substantial evidence for rejecting plaintiff's testimony regarding his symptoms and disabling limitations. The

1 ALJ also erred by failing to properly consider the lay witness statement of David
2 Wheeler. Had the ALJ properly considered plaintiff's statements and Mr. Wheeler's lay
3 witness statement, the residual functional capacity ("RFC") may have included additional
4 limitations. Because this error is not harmless, this matter is reversed pursuant to sentence
5 four of 42 U.S.C. § 405(g) and remanded to the Acting Commissioner for further
6 consideration consistent with this order.

7 BACKGROUND

8
9 Plaintiff, DAVID LEE BEAN, was born in 1968 and was 44 years old on the
10 alleged date of disability onset of April 1, 2012 (*see* AR. 180-89). Plaintiff completed the
11 seventh grade and has not obtained his GED (AR. 45). Plaintiff has work experience as a
12 lube technician, delivery driver, taxi driver, packing trees for shipping, and volunteer
13 fireman (AR. 64, 230-41).

14 According to the ALJ, plaintiff has at least the severe impairments of "Chronic
15 Obstructive Pulmonary Disease; Status Post Small Bowel Resection; and Status Post
16 Cervical Discectomy and Fusion (20 CFR 416.920(c))" (AR. 26).

17 At the time of the hearing, plaintiff was living in a mobile home with a roommate
18 (AR. 52).

19 PROCEDURAL HISTORY

20 Plaintiff's application for Supplemental Security Income ("SSI") benefits pursuant
21 to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and
22 following reconsideration (*see* AR. 108-11, 112-18). Plaintiff's requested hearing was
23 held before Administrative Law Judge Gary Elliott ("the ALJ") on February 19, 2014
24

(see AR. 41-68). On March 13, 2014, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act (see AR. 21-39).

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether Dr. Gritzka's opinion, incorporated and considered by the Appeals Council, undermined substantial evidence support of the ALJ's decision; (2) Whether the rejection of the lay testimony stands; (3) Whether the assessment of plaintiff's subjective claims stands; and (4) Whether, in light of these weaknesses, the RFC and hypothetical questions were complete such that substantial evidence supported the ALJ's decision (see Dkt. 15, p. 1).

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

(1) Whether the ALJ erred in rejecting plaintiff's testimony.

Plaintiff argues that the ALJ erred in rejecting his testimony regarding his symptoms and limitations (Dkt. 15, pp. 11-12). If an ALJ rejects the testimony of a claimant once an underlying impairment has been established, the ALJ must support the rejection "by offering specific, clear and convincing reasons for doing so." *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918

1 (9th Cir.1993)). As with all of the findings by the ALJ, the specific, clear and convincing
2 reasons also must be supported by substantial evidence in the record as a whole. 42
3 U.S.C. § 405(g); *see also Bayliss*, 427 F.3d at 1214 n.1 (citing *Tidwell*, 161 F.3d at 601).

4 Here, the ALJ rejected plaintiff's testimony finding that "the claimant's medically
5 determinable impairments could reasonably be expected to cause some of the alleged
6 symptoms ... [but] the claimant's statements concerning the intensity, persistence and
7 limiting effects of these symptoms are not entirely credible" (AR. at 29-30). The ALJ
8 outlined three reasons he found plaintiff's statement less than credible. First, the ALJ
9 found that plaintiff's "allegations are not consistent with the objective medical evidence
10 in the record and cannot be relied upon to determine the extent of his limitations" (AR.
11 30). Second, the ALJ found that plaintiff's activities of daily living undermine his
12 allegations concerning his limitations (AR. 31). Third, the ALJ found that "[t]he evidence
13 does not suggest the claimant is motivated to work consistently [and] [h]is lack of
14 motivation to work undermines his overall credibility" (AR. 31-32). Plaintiff argues that
15 the ALJ offered insufficient reasons to reject his testimony. The undersigned agrees.

17 First, the ALJ rejected plaintiff's testimony because he found it was not supported
18 by the objective medical evidence (*see* Ar. 30, 32). The determination of whether or not
19 to accept a claimant's testimony regarding subjective symptoms requires a two-step
20 analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281-82 (citing *Cotton v.*
21 *Bowen*, 799 F.2d 1407-08 (9th Cir. 1986)). The ALJ must first determine whether or not
22 there is a medically determinable impairment that reasonably could be expected to cause
23 the claimant's symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at
24

1 1281-82. Once a claimant produces medical evidence of an underlying impairment, the
2 ALJ may not discredit then a claimant's testimony as to the severity of symptoms based
3 solely on a lack of objective medical evidence to corroborate fully the alleged severity of
4 pain. *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (citing *Cotton*, 799
5 F.2d at 1407); Social Security Ruling ("SSR") 16-3p, 2016 SSR LEXIS 4 at *12-13 (this
6 Ruling emphasizes that the Administration "will not disregard an individual's statements
7 about the intensity, persistence, and limiting effects of symptoms solely because the
8 objective medical evidence does not substantiate the degree of impairment-related
9 symptoms alleged by the individual").

11 Here, the ALJ found that plaintiff suffers from severe impairments, including
12 COPD, Status Post Small Bowel Resection, and Status Post Cervical Discectomy and
13 Fusion (*see* AR. 26) and also found that plaintiff's impairments "could reasonably be
14 expected to cause some of the alleged symptoms" (*see* AR. 29), but determined that
15 plaintiff's statements are not entirely credible because they are inconsistent with the
16 objective medical evidence (*see* AR. 30). As noted above, however, once a claimant
17 produces medical evidence of an underlying impairment, the ALJ may not discredit then
18 a claimant's testimony as to the severity of symptoms based solely on a lack of objective
19 medical evidence to corroborate fully the alleged severity of pain. *Bunnell*, 947 F.2d at
20 343, 346-47. On this basis alone, because the ALJ found plaintiff's impairments severe,
21 the ALJ erred in rejecting plaintiff's symptom testimony as inconsistent with the medical
22 evidence. *See id.* Moreover, the ALJ determined that "[t]he record does not contain
23 objective evidence indicating why the claimant might have ongoing abdominal pain"
24

1 (AR. 30). However, lack of objective medical evidence is insufficient to reject allegations
2 of pain because “pain is a completely subjective phenomenon” and “cannot be
3 objectively verified or measured.” *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989).

4 Furthermore, the ALJ determined that plaintiff’s “willingness to continue to
5 smoke cigarettes suggests that the limitations caused by his COPD are not as great as
6 alleged” (AR. 30). With respect to smoking in spite of a plaintiff’s impairments, the
7 Ninth Circuit has observed in dicta that “[i]t is certainly possible that [the plaintiff] was
8 so addicted to cigarettes that she continued smoking even in the face of debilitating
9 shortness of breath and acute chemical sensitivity.” *Bray v. Comm’r of Soc. Sec. Admin.*,
10 554 F.3d 1219, 1227 (9th Cir. 2009). Yet, the Court declined to determine whether the
11 ALJ erred in considering the failure to quit smoking because “the ALJ presented four
12 other independent bases for discounting [plaintiff’s] testimony, and each finds ample
13 support in the record,” explaining “the ALJ’s reliance on [plaintiff’s] continued smoking,
14 even if erroneous, amounts to harmless error.” *Id.* Similarly, some district courts in the
15 Ninth Circuit have determined failure to quit smoking undermines the credibility of a
16 claimant’s subjective complaints. *See, e.g., Jones v. Colvin*, No. 1:14-CV-01991-JLT,
17 2016 WL 816484, at *8 (E.D. Cal. Mar. 2, 2016) (collecting cases); *Garner v. Colvin*,
18 No. C12-2045-MAT, 2013 WL 11319013, at *9 (W.D. Wash. July 23, 2013), *aff’d*, 626
19 F. App’x 699 (9th Cir. 2015); *Reeves v. Astrue*, No. C11-5321-MJP-MAT, 2012 WL
20 1032778, at *6 (W.D. Wash. Mar. 6, 2012), *report and recommendation adopted*, No.
21 C11-5321-MJP, 2012 WL 1029669 (W.D. Wash. Mar. 27, 2012). Nevertheless, even if
22 plaintiff’s failure to quit smoking despite his diagnosis of COPD undermines his
23
24

1 | complaints of debilitating COPD, the Court finds that this one reason to reject plaintiff's
2 | testimony does not amount to clear and convincing evidence sufficient to reject all of
3 | plaintiff's symptom testimony.

4 | Second, the ALJ rejected plaintiff's testimony because he determined that
5 | plaintiff's activities of daily living undermine his allegations of disabling limitations.
6 | Specifically, the ALJ determined that:

7 | The claimant's allegations are found to be less than fully credible and
8 | cannot be relied upon to determine the extent of the claimant's limitations.
9 | The claimant's activity level undermines the credibility of his allegations.
10 | The claimant alleges memory impairment but he reported that he uses the
11 | computer a lot. He has also reported that his friend comes and picks him up,
12 | suggesting that he goes places and interacts with others. In September of
13 | 2012 he was riding his bike for ten miles. He was able to mow his lawn but
14 | had to stop because of his diarrhea but returned and finished the task. These
15 | activities are not consistent with the pain and fatigue alleged by the
16 | claimant.

17 | AR. 31 (citations omitted). Regarding activities of daily living, the Ninth Circuit
18 | repeatedly has "asserted that the mere fact that a plaintiff has carried on certain daily
19 | activities does not in any way detract from her credibility as to her overall
20 | disability." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (quoting *Vertigan v. Halter*,
21 | 260 F.3d 1044, 1050 (9th Cir. 2001)). The Ninth Circuit specified "the two grounds for
22 | using daily activities to form the basis of an adverse credibility determination:
23 | (1) whether or not they contradict the claimant's other testimony or (2) whether or not the
24 | activities of daily living meet "the threshold for transferable work skills." *Orn*, 495 F.3d
at 639 (citing *Fair*, 885 F.2d at 603). The ALJ "must make 'specific findings relating to
the daily activities' and their transferability to conclude that a claimant's daily activities

1 warrant an adverse determination regarding if a claimant's statements should be credited.
2 *Orn*, 495 F.3d at 639 (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)). The
3 Ninth Circuit recently revisited this issue of activities of daily living and their consistency
4 with pain-related impairments described by a claimant:

5 [T]he ALJ erred in finding that these activities, if performed in the
6 manner that [the claimant] described, are inconsistent with the pain-
7 related impairments that [the claimant] described in her testimony. We
8 have repeatedly warned that ALJs must be especially cautious in
9 concluding that daily activities are inconsistent with testimony about
10 pain, because impairments that would unquestionably preclude work and
11 all the pressures of a workplace environment will often be consistent
12 with doing more than merely resting in bed all day. *See, e.g., Smolen v.*
13 *Chater*, 80 F.3d , 1273, 1287 n.7 (9th Cir. 1996) ("The Social Security
14 Act does not require that claimants be utterly incapacitated to be eligible
15 for benefits, and many home activities may not be easily transferable to a
16 work environment where it might be impossible to rest periodically or
17 take medication." (citation omitted in original)); *Fair v. Bowen*, 885 F.2d
18 597, 603 (9th Cir. 1989) ("[M]any home activities are not easily
19 transferable to what may be the more grueling environment of the
20 workplace, where it might be impossible to periodically rest or take
21 medication.") Recognizing that "disability claimants should not be
22 penalized for attempting to lead normal lives in the face of their
23 limitations," we have held that "[o]nly if [her] level of activity were
24 inconsistent with [a claimant's] claimed limitations would these
activities have any bearing on [her] credibility." *Reddick v. Chater*, 157
F.3d 715, 722 (9th Cir. 1998) (citations omitted in original): *see also*
Bjornson v. Astrue, 671 F.3d 640, 647 (7th Cir. 2012) ("The critical
difference between activities of daily living and activities in a full-time
job are that a person has more flexibility in scheduling the former than
the latter, can get help from other persons . . . , and is not held to a
minimum standard of performance, as she would be by an employer. The
failure to recognize these differences is a recurrent, and deplorable,
feature of opinions by administrative law judges in social security
disability cases." (citations omitted in original)).

22 *Garrison v. Colvin*, 759 F.3d 955, 1016 (9th Cir. 2014). Plaintiff argues the ALJ erred by
23 relying upon activities of daily living to discredit plaintiff's testimony (*see* Dkt. 15, p.
24

1 11). The Court agrees and finds that the ALJ failed to adequately explain how plaintiff's
2 activities undermine his allegations of disabling pain.

3 The ALJ listed a number of activities that he determined undermined plaintiff's
4 testimony—including using a computer, relying upon his friend for car rides, mowing his
5 yard, and riding his bicycle (*see* AR. 31)—but the ALJ did not explain how plaintiff's
6 activities contradict his allegations of disabling pain, nor did the ALJ explain how these
7 activities translate to a work setting. *Orn*, 495 F.3d at 639. For example, the ALJ cited
8 plaintiff's computer use as evidence of a lack of credibility related to plaintiff's memory
9 loss (*see* AR. 31 citing AR. 581), but the ALJ failed to explain how computer use is
10 inconsistent with plaintiff's allegations of memory loss. Similarly, the ALJ noted that
11 plaintiff's friend picks him up, but again fails to explain how the testimony undermines
12 plaintiff's testimony regarding his symptoms. Further, the assumption that plaintiff "goes
13 places and interacts with others" because his friend picks him up is impermissible
14 speculation, *see* SSR 86-8, 1986 SSR LEXIS 15 at *22 (an ALJ may not speculate),
15 unsupported by substantial evidence. Indeed, plaintiff's friend and lay witness reported
16 that plaintiff relies upon him for transportation to the grocery store, to visit with family,
17 and to medical appointments (AR. 280). Finally, the ALJ suggested that plaintiff's
18 exercise in September 2012 is evidence of plaintiff's lack of credibility (AR. 31 citing
19 AR. 584). However, a doctor recommended that plaintiff exercise "when the pain comes
20 on" (AR. 584), and plaintiff should not be penalized for following a doctor's orders and
21 attempting to lead a normal life in the face of his limitations. *See Reddick*, 157 F.3d at
22 722.
23
24

1 Third, the ALJ rejected plaintiff's testimony finding that he is not "motivated to
2 work consistently" (AR. 31-32). The ALJ noted that plaintiff's "earnings records show
3 sporadic earnings and low earnings ... [that] suggests that the claimant has not been
4 motivated to work and continues to lack motivation to work" (AR. 32). Evidence of a
5 poor work history that suggests a claimant is not motivated to work can be a proper
6 reason to discredit a claimant's testimony that he is unable to work. *Thomas v. Barnhart*,
7 278 F.3d 947, 959 (9th Cir. 2002); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir.
8 2008) (finding that lack of motivation to work is a sufficient reason to discount a
9 plaintiff's testimony); *see also Franz v. Colvin*, 91 F. Supp. 3d 1200, 1209–10 (D. Or.
10 2015) (holding the same). However, as an initial matter, the ALJ failed to indicate what
11 evidence he was relying upon in concluding that plaintiff was not motivated to work. In
12 the absence of such an explanation or supporting evidence, the ALJ's conclusion that
13 plaintiff had little motivation to work is insufficient. Moreover, the Court disagrees that
14 plaintiff's work history is inconsistent with his allegations of disability. Plaintiff testified
15 that he drove a taxi cab from 2010 through the date he became disabled in April 2012
16 (*see* AR. 47-48). He also testified that he was released from the hospital with restrictions
17 preventing him from working (AR. 48). Thus, based on the record before it, the Court
18 finds that the ALJ's determination that plaintiff's symptoms and testimony are belied by
19 his lack of motivation is not supported by the record as a whole. Based on the foregoing,
20 the Court concludes that the ALJ failed to provide clear and convincing reasons for
21 failing to credit fully plaintiff's allegations of his limitations.
22
23
24

1 Nevertheless, the Ninth Circuit has “recognized that harmless error principles
2 apply in the Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th
3 Cir. 2012) (citing *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir.
4 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in *Stout*
5 that “ALJ errors in social security are harmless if they are ‘inconsequential to the ultimate
6 nondisability determination.’” *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015)
7 Here, had the ALJ credited fully plaintiff’s allegations, the RFC determination would
8 have been very different. For example, plaintiff alleged limitations related to his ability to
9 lift more than ten pounds (*see* AR. 46-47), while the ALJ’s RFC finding includes the
10 ability to “lift twenty pounds occasionally and ten pounds frequently” (AR. 28. Similarly,
11 the ALJ rejected plaintiff’s testimony regarding his pain and frequent bathroom breaks
12 (*see* AR. 46-47) with no limitations in the RFC regarding these impairments. Thus, the
13 ALJ’s rejection of plaintiff’s testimony was not harmless as the Court cannot conclude
14 with confidence “that no reasonable ALJ, when fully crediting the testimony, could have
15 reached a different disability determination.” *See Marsh*, 792 F.3d at 1173 (citing *Stout*,
16 454 F.3d at 1055-56).

18 **(2) Whether the ALJ properly rejected the lay witness statement.**

19 Plaintiff also challenges the ALJ’s treatment of the lay witness statement of
20 plaintiff’s roommate, David Wheeler (Dkt. 15, pp. 9-11). Mr. Wheeler offered a lay
21 witness statement about the claimant and noted that plaintiff’s health has “declined
22 dramatically since his pulmonary embolism in 2012” (AR. 280). He observed that
23 although plaintiff attempts “ordinary household chores ... he becomes winded” (AR.
24

1 280). Mr. Wheeler also stated that plaintiff depends on him for transportation to
2 appointments and to visit family, that plaintiff uses the restroom multiple times a day, and
3 that plaintiff suffers from “serious memory limitations” (AR. 280).

4 Pursuant to the relevant federal regulations, in addition to “acceptable medical
5 sources,” that is, sources “who can provide evidence to establish an impairment,” 20
6 C.F.R. § 404.1513 (a), there are “other sources,” such as friends and family members,
7 who are defined as “other non-medical sources” and “other sources” such as physical
8 therapists and physician assistants, who are considered other medical sources, *see* 20
9 C.F.R. § 404.1513 (d); *see also* *Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1223-24
10 (9th Cir. 2010) (citing 20 C.F.R. § 404.1513(a), (d)); *Cole v. Astrue*, 395 F. App’x 387,
11 389 (9th Cir. 2010); SSR 06-3p, 2006 WL 2329939 at *2. An ALJ may disregard opinion
12 evidence provided by both types of “other sources,” characterized by the Ninth Circuit as
13 lay testimony, “if the ALJ ‘gives reasons germane to each witness for doing so.’” *Turner*,
14 613 F.3d at 1224 (quoting *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)); *see also*
15 *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). This is because in
16 determining whether or not “a claimant is disabled, an ALJ must consider lay witness
17 testimony concerning a claimant’s ability to work.” *Stout v. Comm’r, Social Security*
18 *Administration*, 454 F.3d 1050, 1053 (9th Cir. 2006) (citing *Dodrill*, 12 F.3d at 919); 20
19 C.F.R. §§ 404.1513(d) (4) and (e), 416.913(d) (4) and (e)).
20
21

22 The Ninth Circuit has characterized lay witness testimony as “competent
23 evidence,” noting that an ALJ may not discredit “lay testimony as not supported by
24 medical evidence in the record.” *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009)

1 (citing *Smolen*, 80 F.3d at 1289). Similar to the rationale that an ALJ may not discredit a
2 plaintiff's testimony as not supported by objective medical evidence once evidence
3 demonstrating an impairment has been provided, *Bunnell*, 947 F.2d at 343, 346-47
4 (citation omitted), but may discredit a plaintiff's testimony when it contradicts evidence
5 in the medical record, *see Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) (citing
6 *Allen v. Heckler*, 749 F.3d 577, 579 (9th Cir. 1984)), an ALJ may discredit lay testimony
7 if it conflicts with medical evidence, even though it cannot be rejected as unsupported by
8 the medical evidence. *See Lewis*, 236 F.3d at 511 (An ALJ may discount lay testimony
9 that "conflicts with medical evidence") (citing *Vincent v. Heckler*, 739 F.2d 1393, 1395
10 (9th Cir. 1984); *Bayliss*, 427 F.3d at 1218 ("Inconsistency with medical evidence" is a
11 germane reason for discrediting lay testimony) (citing *Lewis*, 236 F.3d at 511)).
12

13 The ALJ "considered" Mr. Wheeler's opinion but stated it "cannot be given great
14 weight as: [1] "it is not consistent with the totality of the evidence in the record" and
15 "[a]lthough the undersigned finds that the lay witness' statement is generally credible as
16 to his observations, his statements are inconsistent with the medical evidence of record,
17 which does not support the claimant's allegations" and; [2] "Mr. Wheeler is not a trained
18 medical professional nor is he an expert [at] pain levels" (AR. 32). Neither reason offered
19 to discount Mr. Wheeler's statement is sufficient.
20

21 First, the ALJ rejected Mr. Wheeler's statement as inconsistent with the medical
22 evidence. Although "[i]nconsistency with medical evidence" is a germane reason for
23 discrediting lay testimony, *see Bayliss*, 427 F.3d at 1218, the ALJ did not explain how
24

1 Mr. Wheeler's statement is inconsistent with the medical evidence. Thus, the first reason
2 the ALJ offered to reject Mr. Wheeler's opinion is insufficient.

3 Second, the ALJ rejected Mr. Wheeler's statement because he is not a trained
4 expert in pain levels. The fact that Mr. Wheeler is not a medical professional is not a
5 germane reason for rejecting his statement regarding his observations of plaintiff's
6 limitations. Lay witnesses, by definition, are not medical professionals, and the ALJ's
7 reasoning would lead to a wholesale dismissal of all opinions or statements by lay
8 witnesses. "Disregard of [lay witness] evidence violates the Secretary's regulation that he
9 will consider observations by non-medical sources as to how an impairment affects a
10 claimant's ability to work." *Dodrill*, 12 F.3d at 919 (citations omitted).

12 Accordingly, the ALJ failed to give any legally adequate reason to reject the lay
13 witness statement made by Mr. Wheeler.

14 **(3) Whether the ALJ's decision is supported by substantial evidence in**
15 **light of Dr. Gritzka's opinion, incorporated and considered by the**
16 **Appeals Council.**

17 Plaintiff also argues that the ALJ's decision is no longer supported by substantial
18 evidence in light of an opinion by Thomas Gritzka, M.D., incorporated into the record by
19 the Appeals Council after the ALJ issued his decision (*see* Dkt. 15, pp. 4-9). In light of
20 the fact that this matter is remanded for the ALJ to reconsider plaintiff's testimony and
21 statements and to reconsider the lay witness statement of Mr. Wheeler, the Court need not
22 address whether the ALJ's decision is supported by substantial evidence. Upon remand,
23 the ALJ shall incorporate Dr. Grizka's opinion into his analysis.

1 **(4) Whether, in light of these errors, the RFC and hypothetical questions**
2 **were complete.**

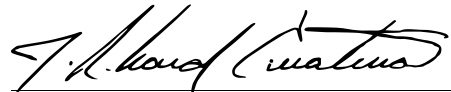
3 Finally, plaintiff argues the ALJ's RFC is flawed, and thus the hypothetical
4 questions posed to the vocational expert were flawed (*see* Dkt. 15, p. 12). As discussed in
5 Section 1, *supra*, had the ALJ properly weighed plaintiff's credibility, the RFC may have
6 included additional limitations. Similarly, the hypothetical questions posed to the
7 vocational expert may have been different. Thus, upon remand, the ALJ shall re-evaluate
8 the RFC and Step Five findings, if necessary.

9 CONCLUSION

10 Based on these reasons and the relevant record, the Court **ORDERS** that this
11 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
12 405(g) to the Acting Commissioner for further consideration consistent with this order.

13 **JUDGMENT** should be for plaintiff and the case should be closed.

14 Dated this 7th day of September, 2016.

15
16 

17 J. Richard Creatura
18 United States Magistrate Judge
19
20
21
22
23
24